# Kerajaan Malaysia v PDS Training Camp Sdn Bhd and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS N-01(NCvC)(W)-324–06 OF 2023 AND N-01(NCvC)(W)-388–07 OF 2023
MARIANA YAHYA, HASHIM HAMZAH AND LIM CHONG FONG JJCA
20 SEPTEMBER 2024

*Contract — Termination — Construction of termination clause — Clause in contract entitled Government of Malaysia ('GOM') to terminate contract at any time on ground of national interest, national security or national/public policy — Whether clause disentitling other party from claiming for any loss or damage caused by such termination was void for contravening s 29 of Contracts Act 1950 and for being against public policy — Whether other party had entered into contract with full knowledge of the terms and their repercussions and could not later complain of inequality of bargaining power*

PDS Training Camp Sdn Bhd ('PDS') entered into a contract with the Government of Malaysia ('the GOM') to provide training facilities, accommodation and food services for participants in the National Service Training Programme ('PLKN') at its camp in Port Dickson, Negeri Sembilan. During the term of the contract, which was scheduled to expire on 31 December 2020, PDS incurred expenses to begin construction of a much bigger training camp as requested by the GOM. In September 2018, GOM prematurely terminated the contract following its decision, after the 2018 General Election, to dissolve the PLKN. The GOM relied upon cl 36 of the contract to terminate. Under cl 36, the parties had agreed that GOM could terminate the contract at any time by giving 30 days' notice and without assigning any reason for the same if it considered the termination necessary for national interest, national security or national/public policy. Clause 36 provided that the GOM's decision to terminate was final and conclusive and could not be challenged. The parties had further agreed that PDS was not entitled to claim for any loss or damage consequent upon such termination. PDS sued the GOM in the High Court for: (a) a declaration that cl 36 was void for contravening the provisions of the Contracts Act 1950 ('the CA'); (b) RM3,444,130.69 as costs incurred for the construction of the new training camp; and (c) RM4,136,530.23 for loss of profits for the unexpired term of the contract. The High Court allowed PDS's claims, holding that: (i) cl 36 was void for contravening s 29 of the CA in that it absolutely barred PDS from pursuing any legal action to enforce its rights under the contract and indirectly

ousted the court's jurisdiction to hear and determine any dispute relating to the contract; and (ii) cl 36 was against public policy for denying PDS of its right to obtain compensation for the losses it had suffered by the premature termination. The GOM appealed against the whole of the High Court's decision whilst PDS appealed against the High Court's disallowing of its claim for loss of rental of infrastructure services and provision of catering services for the period from October to December 2020.

**Held**, allowing the GOM's appeal and dismissing PDS's appeal:

(1) The GOM's invocation of cl 36 of the contract did not absolutely restrict all of PDS's rights and remedies. PDS was only disallowed from claiming loss and damage consequential to the termination of the contract, but not the contract consideration which had already accrued to PDS up to the termination of the contract. Consequently, cl 36 did not infringe s 29 of the Contracts Act 1950. The High Court's application of s 29 to invalidate cl 36 was a serious misdirection and was plainly wrong, warranting appellate intervention (see paras 33 & 37).

(2) Unlike the fact-situation that existed in *CIMB Bank Bhd v Anthony Lawrence Bourke & Anor* [2019] 2 MLJ 1, which concerned a banking loan contract between a bank and a borrower in which the bank was in a stronger bargaining position, the instant case was a services contract procured by PDS on an open tender basis at the GOM's invitation. The terms of the contract required by the GOM were made known to all tenderers prior to submission of the tenders. PDS was at liberty not to bid if it found the requisite terms unacceptable. There was also no evidence that PDS had sought to delete cl 36 at all material times. Factually, there was no bargaining here to attract the notion of unequal bargaining power. The High Court's finding that there was unequal bargaining power between the parties was unsustainable (see paras 35–36).

(3) The contract did not offend s 24 of the Contracts Act 1950 because the objects of the contract were not unlawful in any way. Clause 36 was also not contrary to public policy because PDS still had legal recourse if the termination provision in cl 36 had been used capriciously in bad faith. From the evidence, this court was satisfied that cl 36 was invoked in the national interest, particularly due to the financial constraint faced by the GOM. PDS had not made out a case that the usage of cl 36 by the GOM was improper and mala fide. Clause 36.1 of the contract was lawfully exercised and PDS's consequential claims were losses that were excluded by cl 36.3 of the contract (see paras 38 & 40).

(4) PDS's claim for loss of rental of infrastructure services and provision of catering services for the period from October to December 2020 (its appeal was against the High Court's disallowing of these claims) were

losses that were excluded by cl 36.3 of the contract. Accordingly, its appeal herein was dismissed (see para 42).

**[Bahasa Malaysia summary**

PDS Training Camp Sdn Bhd ('PDS') memasuki kontrak dengan Kerajaan Malaysia ('KM') untuk menyediakan kemudahan latihan, penginapan dan perkhidmatan makanan untuk peserta Program Latihan Khidmat Negara ('PLKN') di kemnya di Port Dickson, Negeri Sembilan. Sepanjang tempoh kontrak, yang dijadualkan tamat pada 31 Disember 2020, PDS mengeluarkan perbelanjaan untuk memulakan pembinaan kem latihan yang lebih besar seperti yang diminta oleh KM. Pada September 2018, KM telah menamatkan kontrak secara pra-matang berikutan keputusannya, selepas Pilihan Raya Umum 2018, untuk membubarkan PLKN. KM bergantung pada klausa 36 kontrak tersebut untuk penamatan. Di bawah klausa 36, pihak-pihak telah bersetuju bahawa KM boleh menamatkan kontrak pada bila-bila masa dengan memberikan notis 30 hari dan tanpa memberikan sebarang alasan untuk perkara tersebut jika ia menganggap penamatan itu perlu untuk kepentingan negara, keselamatan negara atau dasar negara/awam. Klausa 36 memperuntukkan bahawa keputusan KM untuk penamatan adalah muktamad dan konklusif dan tidak boleh dicabar. Pihak-pihak selanjutnya bersetuju bahawa PDS tidak berhak untuk menuntut sebarang kerugian atau kerugian akibat penamatan tersebut. PDS menyaman KM di Mahkamah Tinggi untuk: (a) satu deklarasi bahawa klausa 36 adalah terbatal kerana melanggar peruntukan Akta Kontrak 1950 ('AK'); (b) RM3,444,130.69 sebagai kos yang ditanggung untuk pembinaan kem latihan baharu; dan (c) RM4,136,530.23 untuk kehilangan keuntungan bagi tempoh kontrak yang belum tamat. Mahkamah Tinggi membenarkan tuntutan PDS, dengan memutuskan bahawa: (i) klausa 36 adalah terbatal kerana melanggar s 29 AK kerana ia secara mutlak menghalang PDS daripada meneruskan sebarang tindakan undang-undang untuk menguatkuasakan haknya di bawah kontrak dan secara tidak langsung mengatasi bidang kuasa mahkamah untuk mendengar dan menentukan sebarang pertikaian yang berkaitan dengan kontrak; dan (ii) klausa 36 adalah bertentangan dengan dasar awam kerana menafikan hak PDS untuk mendapatkan pampasan bagi kerugian yang dialaminya akibat penamatan pramatang. KM merayu terhadap keseluruhan keputusan Mahkamah Tinggi manakala PDS merayu terhadap keputusan Mahkamah Tinggi yang tidak membenarkan tuntutannya bagi kehilangan penyewaan perkhidmatan infrastruktur dan penyediaan perkhidmatan katering untuk tempoh dari Oktober hingga Disember 2020.

**Diputuskan**, membenarkan rayuan KM dan menolak rayuan PDS:

(1) Penggunaan oleh KM terhadap klausa 36 kontrak tidak secara mutlak menyekat semua hak dan remedi PDS. PDS hanya tidak dibenarkan menuntut kerugian dan kerosakan akibat penamatan kontrak, tetapi

bukan balasan kontrak yang telah terakru kepada PDS sehingga penamatan kontrak. Akibatnya, klausa 36 tidak melanggar s 29 Akta Kontrak 1950. Penggunaan oleh Mahkamah Tinggi s 29 untuk membatalkan klausa 36 adalah salah arah yang serius dan jelas salah, yang memerlukan campur tangan rayuan (lihat perenggan 33 & 37).

(2) Tidak seperti situasi fakta yang wujud dalam *CIMB Bank Bhd v Anthony Lawrence Bourke & Anor* [2019] 2 MLJ 1, yang melibatkan kontrak pinjaman perbankan antara bank dan peminjam di mana bank berada dalam kedudukan tawar-menawar yang lebih kukuh, kes semasa adalah kontrak perkhidmatan yang diperoleh oleh PDS secara tender terbuka atas jemputan KM. Terma kontrak yang diperlukan oleh KM telah dimaklumkan kepada semua petender sebelum penyerahan tender. PDS bebas untuk tidak membida jika didapati syarat yang diperlukan tidak boleh diterima. Juga tiada keterangan bahawa PDS telah berusaha untuk membuang klausa 36 pada setiap masa yang material. Sebenarnya, tidak ada tawar-menawar di sini untuk menarik tanggapan kuasa tawar-menawar yang tidak sama rata. Dapatan Mahkamah Tinggi bahawa terdapat kuasa tawar-menawar yang tidak sama rata antara pihak-pihak adalah tidak boleh dipertahankan (lihat perenggan 35–36).

(3) Kontrak tersebut tidak menyalahi s 24 Akta Kontrak 1950 kerana tujuan kontrak tersebut tidak menyalahi undang-undang dalam apa jua cara. Klausa 36 juga tidak bertentangan dengan dasar awam kerana PDS masih mempunyai tindakan undang-undang sekiranya peruntukan penamatan dalam klausa 36 telah digunakan secara niat jahat. Daripada keterangan, mahkamah ini berpuas hati bahawa klausa 36 digunakan untuk kepentingan negara, terutamanya disebabkan oleh kekangan kewangan yang dihadapi oleh KM. PDS tidak membuktikan kes bahawa penggunaan klausa 36 oleh KM adalah tidak wajar dan mala fide. Klausa 36.1 kontrak telah dilaksanakan secara sah dan tuntutan berbangkit PDS adalah kerugian yang dikecualikan oleh klausa 36.3 kontrak tersebut (lihat perenggan 38 & 40).

(4) Tuntutan PDS untuk kehilangan penyewaan perkhidmatan infrastruktur dan penyediaan perkhidmatan katering untuk tempoh dari Oktober hingga Disember 2020 (rayuannya adalah terhadap penolakan Mahkamah Tinggi terhadap tuntutan ini) adalah kerugian yang dikecualikan mengikut klausa 36.3 kontrak. Sehubungan itu, rayuannya di sini telah ditolak (lihat perenggan 42).]

**Cases referred to**

*CIMB Bank Bhd v Anthony Lawrence Bourke & Anor* [2019] 2 MLJ 1; [2019] 2 CLJ 1, FC (distd)

*Kerajaan Malaysia v Bagai Budi Sdn Bhd* (Civil Appeal No

W-01(NCVC)(W)-413–06 of 2022) (unreported), CA (folld)
*Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors* [2020] 12 MLJ 67; [2020] 10 CLJ 1, FC (refd)
*Pembinaan Perwira Harta Sdn Bhd v Letrikon Jaya Bina Sdn Bhd* [2013] 2 MLJ 620; [2013] 2 CLJ 437, FC (refd)
*Perembun (M) Sdn Bhd v Conlay Construction Sdn Bhd* [2012] 4 MLJ 149; [2012] CLJU 1416, CA (refd)
*The Pacific Bank Bhd (sued as guarantor) v Kerajaan Negeri Sarawak* [2014] 6 MLJ 153; [2015] 3 CLJ 717, FC (refd)

**Legislation referred to**

Contracts Act 1950 ss 29, 24
Federal Constitution art 8

**Appeal from**: Civil Suit No NA-21NCvC-2–01 of 2020 (High Court, Seremban)

*Amalina bt Zainal Mokhtar (with Mohamad Shafiq bin Mohd Sazalli) (Negeri Sembilan State Legal Advisor's Office) in Civil Appeal No N-01(NCvC)(W)-324–06 of 2023 for the appellant.*
*Adnan bin Seman @ Abdullah (with Haris bin Md Nor) (Adnan Sharida & Assoc) in Civil Appeal No N-01(NCvC)(W)-388–07 of 2023 for the appellant.*
*Amalina bt Zainal Mokhtar (with Mohamad Shafiq bin Mohd Sazalli) (Negeri Sembilan State Legal Advisor's Office) in Civil Appeal No N-01(NCvC)(W)-388–07 of 2023 for the respondent.*
*Adnan bin Seman @ Abdullah (with Haris bin Md Nor) (Adnan Sharida & Assoc) in Civil Appeal No N-01(NCvC)(W)-324–06 of 2023 for the respondent.*

**Lim Chong Fong JCA:**

INTRODUCTION

**[1]** These are after-trial appeals in respect of termination of a contract based on national interest.

**[2]** The appellant in Civil Appeal No N-01(NCvC)(W)-324–06 of 2023 ('Appeal 324') and the respondent in Civil Appeal No N-01(NCvC)(W)-388–07 of 2023 ('Appeal 388'), who is the defendant in the action, is the Federal Government of Malaysia.

**[3]** The respondent in Appeal 324 and the appellant in Appeal 388, who is the plaintiff in the action, is a private limited company involved in the accommodation and food services business.

**[4]** We heard the appeals which have earlier been ordered by this court to be heard together on 6 May 2024 and thereafter adjourned them to deliberate on the arguments put-forth by the parties respectively.

**[5]** Upon so doing, we give our decision hereinbelow together with the supporting grounds. For purposes herein and in avoidance of confusion, we will refer the parties as the plaintiff and defendant respectively.

BACKGROUND

**[6]** By a Contract No KP/JKLN(PRA)KRM31/2014 entered into between the parties after a tender exercise, the plaintiff undertook to provide the defendant with training facilities and food services for the 'Program Latihan Khidmat Negara (PLKN)' at the PLKN Camp PDS, Port Dickson, Negeri Sembilan ('the contract').

**[7]** The duration of the contract is initially for three years from 2003 and after several renewals, the contract is scheduled to lapse on 31 December 2020.

**[8]** During the term of the contract, the plaintiff also undertook the expansion of the PLKN camp by relocating the PDS Resort to a new camp to be developed at Lot 5343, 5344, 5345, 5346 and 5347 Mukim Pasir Panjang, Port Dickson, to fulfil the 30-acre contractual requirement, as requested by the plaintiff and approved by the defendant's Ministry of Defence.

**[9]** However, the defendant prematurely by notice on 3 September 2018 sent to the respondent terminated the contract pursuant to cl 36 of the contract. The notice is reproduced below:

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A

KETUA SETIAUSAHA
*SECRETARY GENERAL*
KEMENTERIAN PERTAHANAN
*MINISTRY OF DEFENCE*
JALAN PADANG TEMBAK
50634 KUALA LUMPUR

Tel. : 03-2691 6464
03-2071 5010
Fax : 03-2698 4662
Email : halimi@mod.gov.my

B

Ruj.Tuan :
Ruj.Kami : KP.JLKN.BPr.200-3/3 Jil.2 (35)
Tarikh : 3 September 2018

C

**Pengarah Urusan**
**PDS Training Camp Sdn. Bhd.**
PT 7445 & PT 7446
Jalan BBN 1/2H, Putra Point 1
71800 Bandar Baru Nilai
**NEGERI SEMBILAN**

RECEIVED
04 SEP 2018

Tuan,

**NOTIS PENAMATAN PERJANJIAN SEWAAN PERKHIDMATAN PRASARANA, KEMUDAHAN-KEMUDAHAN LATIHAN DAN PERKHIDMATAN SAJIAN MAKANAN UNTUK PROGRAM LATIHAN KHIDMAT NEGARA (PLKN) DI KEM PLKN PDS RESORT, PORT DICKSON, NEGERI SEMBILAN**
**- NO. KONTRAK : KP/JLKN(PRA)KEM31/2014**

D

Dengan hormatnya perkara di atas dirujuk.

2. Adalah dimaklumkan bahawa pihak Kerajaan pada **13 Ogos 2018** telah memutuskan Program Latihan Khidmat Negara (PLKN) dimansuhkan.

E

3. Sehubungan itu, **Perjanjian Sewaan Perkhidmatan Prasarana, Kemudahan-Kemudahan Latihan Dan Perkhidmatan Sajian Makanan Untuk Program Latihan Khidmat Negara (PLKN) Di Kem PLKN PDS Resort, Port Dickson, Negeri Sembilan** (Kontrak) bernombor rujukan KP/JLKN(PRA)KEM31/2014 **DITAMATKAN** selaras dengan Klausa 36 – Penamatan Kontrak Atas Kepentingan Negara berkuat kuasa **tiga puluh (30) hari dari tarikh notis ini dikeluarkan.**

4. Notis ini adalah satu notis rasmi bagi tindakan penamatan kontrak dan Kontraktor tidak berhak untuk menuntut sebarang kerugian termasuk kehilangan perolehan pendapatan, pampasan, tuntutan, ganti rugi atau sebagainya atas penamatan Kontrak tersebut.

F

Sekian, terima kasih.

**"BERKHIDMAT UNTUK NEGARA"**
**"PERTAHANAN NEGARA, TANGGUNGJAWAB BERSAMA"**

G

**(DATO' HALIMI BIN ABD MANAF)**
Ketua Setiausaha
Kementerian Pertahanan Malaysia

S/N [illegible]
****Note : Serial number will be used to verify the originality of this document via eFILING portal**

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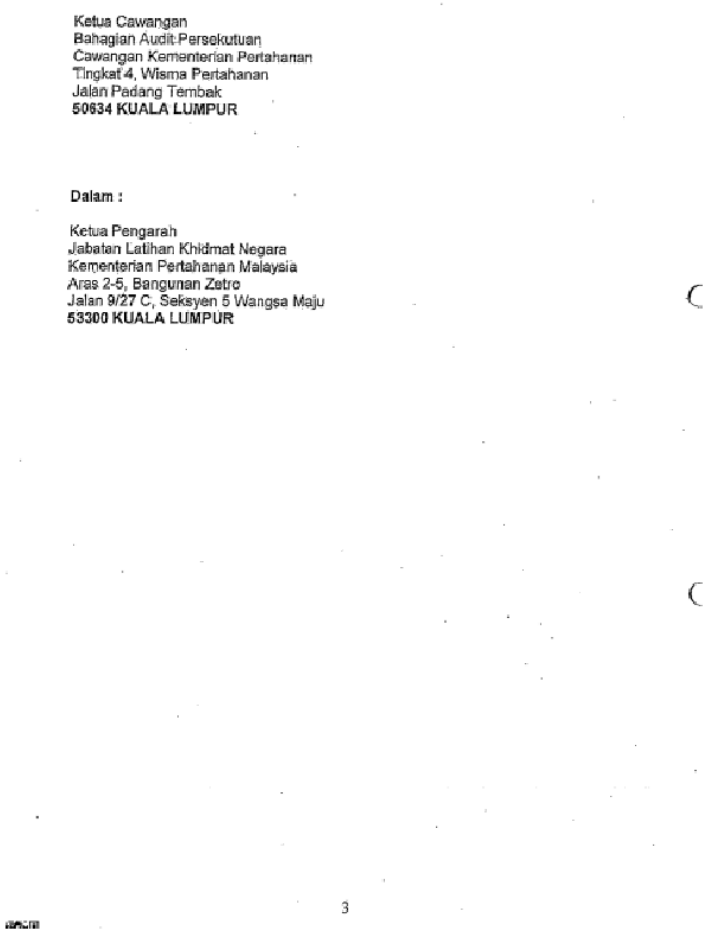

Ketua Cawangan
Bahagian Audit Persekutuan
Cawangan Kementerian Pertahanan
Tingkat 4, Wisma Pertahanan
Jalan Padang Tembak
**50634 KUALA LUMPUR**

**Dalam :**

Ketua Pengarah
Jabatan Latihan Khidmat Negara
Kementerian Pertahanan Malaysia
Aras 2-5, Bangunan Zetro
Jalan 9/27 C, Seksyen 5 Wangsa Maju
**53300 KUALA LUMPUR**

3

**[10]** It is provided as follows in cl 36 of the contract:

(36.1) Tidak tertakluk kepada mana-mana peruntukan dalam Kontrak ini, KERAJAAN berhak menamatkan Kontrak ini pada bila-bila masa dengan memberikan notis bertulis tidak kurang daripada tiga puluh (30) hari kepada KONTRAKTOR (tanpa memberi apa-apa sebab) sekiranya kerajaan berpendapat penamatan itu perlu dilaksanakan atas kepentingan negara keselamatan negara atau bagi tujuan polisi kerajaan atau polisi awam.

(36.2) Bagi maksud klausa ini, perkara yang berjumlah kepada 'kepentingan negara', 'kepentingan keselamatan negara', 'polisi kerajaan' dan 'polisi awam'

hendaklah diputuskan oleh KERAJAAN sahaja dan keputusan itu adalan muktamad dan tidak boleh dicabar.

(36.3) Pihak-pihak bersetuju bahawa KONTRAKTOR tidak berhak untuk menuntut sebarang kerugian termasuk kehilangan perolehan pendapatan, pampasan, tuntutan, gantirugi atau sebagainya atas penamatan Kontrak itu.

Which is translated as follows:

(36.1) Notwithstanding any provision of this Contract, the GOVERNMENT may terminate this Contract by giving not less than thirty (30) days written notice to that effect to the contractor (without any obligation to give any reason thereof) if the GOVERNMENT considers that such termination s necessary for national interest, national policy or national security.

(36.2) For the purpose of this clause, what constitutes 'national interest', 'national policy' and 'national security' shall be solely made and determined by the GOVERNMENT and such determination shall for all intent and purposes be final and conclusive and shall not be open to any challenge whatsoever.

(36.3) The parties agree that the CONTRACTOR shall not be entitled to claim for any losses including loss of income, compensation, claim, damages or the like by reason of the termination of the contract.

**[11]** As the result, the plaintiff on 13 January 2020 commenced Seremban High Court Suit No NA-21NCVC-2–01 of 2020 ('the suit') against the defendant.

IN THE HIGH COURT

**[12]** In the suit, the plaintiff principally claimed and prayed for the following reliefs:

(a) a declaration that cl 36 of the contract is void and in contravention of the Contracts Act 1950 and is not binding on the plaintiff;

(b) RM3,444,130.69 damages for the costs of construction of the new camp; and

(c) RM4,136,530.23 damages for loss of profit for the balance of the contract from October 2018 till 2020.

**[13]** This is resisted by the defendant relying on the provisions of cl 36 of the contract which is binding on the parties and enforceable.

**[14]** The learned judicial commissioner ('JC') on 20 June 2023 allowed the plaintiff's claim ('judgment') and held as follows in the grounds of judgment ('GOJ'):

(22) Melalui pembacaan klausa 36 perjanjian, pemahaman dan pembacaan Mahkamah terhadap kluasa tersebut adalah sebagaimana berikut:

(a) klausa tersebut memberikan hak untuk defendan menamatkan perjanjian tersebut pada bila bila masa dengan memberikan notis bertulis tidak kurang daripada 30 hari kepda plaintif atas sebab kepentingan dan keselamatan negara tanpa perlu memperincikan sebab-sebab tersebut;

(b) notis penamatan adalah muktamad dan tidak boleh dicabar;

(c) plaintif tidak berhak untuk menuntut sebarang kerugian yang terpaksa ditanggung oleh plaintif atas penamatan tersebut daripada defendan.

(23) Daripada pemerhatian mahkamah, klausa 36 adalah merupakan satu bentuk pengecualian liabiliti. Definasi terma pengecualian liabiliti adalah seperti berikut:

> An exemption (exclusion) clauses excludes one party wholly or in part from liability under the contract or from liability for a tort connected with a contract or limits such liability. (Para 3.4 General Principles of Malaysian Contract Law).

(24) Mengikut definasi ini, mana-mana klausa yang mengecualikan mana-mana pihak daripada menanggung sebarang liabiliti dalam sesuatu perjanjian adalah satu klausa pengecualian liabiliti.

...

(29) Secara zahirnya, defendan akan bergantung kepada klausa pengecualian ini untuk melindungi pihaknya daripada bertanggungan terhadap sebarang kerugian yang akan ditanggung oleh plaintif akibat penamatan kontrak ini.

...

(38) Klausa 36 yang merupakan satu bentuk pengecualian liabiliti, secara jelas dan terang menghalang dan menafikan hak plaintif dari menuntut sebarang kerugian daripada defendan sekiranya kontrak ditamatkan. Ini bermakna, kluasa 36 ini juga secara tidak langsung telah menghakis bidangkuasa mahkamah untuk mendengar dan membicarakan isu ini.

(39) Berpandukan kepada keputusan yang telah dicapai di dalam kes *CIMB Bank Bhd v Anthony Lawrence Bourke & Anor* [2019] 2 MLJ 1; [2018] 1 LNS 1887 di atas, mahkamah ini memutuskan bahawa klausa 36 adalah jelas bertentangan dengan s 29 Akta Kontrak 1950. Atas alasan ini sahaja, mahkamah berpandangan bahawa klausa 36 perjanjian tersebut adalah tidak sah dan secara implikasinya, pihak-pihak adalah tidak terikat dengan klausa tersebut.

(40) Isu yang seterusnya adalah sama ada klausa 36 tersebut yang merupakan satu 'exclusion clause' dan ternyata secara mutlak menyekat hak plaintif untuk menuntut haknya di Mahkamah adalah bertentangan dengan 'public policy'.

...

(50) Berbalik kepada kes di hadapan mahkamah ini, secara anologinya, mahkamah ini mendapati terdapat banyak persamaan fakta di antara kes *CIMB* dengan kes di hadapan mahkamah ini. Di dalam kes *CIMB*, Mahkamah Persekutuan telah menyentuh tentang 'inequality of bargaining power' di antara pihak-pihak yang

telah menyebabkan termeterainya klausa-klausa yang dianggap berat sebelah. Keadaan ini pada makna zahirnya bermaksud satu keadaan di mana pihak-pihak mempunyai kuasa tawar menawar yang tidak seimbang sehingga pihak yang mempunyai kekuatan tawar menawar yang lebih lemah tidak dapat berunding untuk sebarang variasi atau perubahan terhadap terma dan syarat perjanjian.

...

(61) Klausa 36 yang menjadi pokok pertikaian di sini jelas lebih memihak kepada defendan yang merupakan pihak yang mempunyai kuasa tawar menawar yang lebih tinggi. Ianya bukan sahaja satu terma pengecualian liabiliti yang berfungsi melindungi defendan daripada bertanggungan terhadap sebarang gantirugi yang bakal ditanggung oleh plaintif akibat penamatan kontrak, malah ianya juga menyekat atau menghalang plaintif daripada membawa sebarang tindakan undang-undang terhadap defendan untuk menuntut sebarang gantirugi yang terpaksa ditanggung oleh plaintif akibat dari penamatan awal perjanjian tersebut oleh defendan.

(62) Berdasarkan keterangan-keterangan yang dikemukakan, plaintif, pada setiap masa telah mematuhi setiap syarat yang telah ditetapkan oleh defendan. Plaintif telah memulakan kerja-kerja membina kem di tapak baru atas arahan defendan dan atas jaminan bahawa kontrak hanya akan disambung dengan pembinaan kem baru tersebut, keterangan juga menunjukkan bahawa plaintif telah membina prasarana yang baru ini menggunakan perbelanjaan sendiri dengan harapan akan mendapat keuntungan setelah kem beroperasi melalui sewa yang dibayar oleh defendan.

(63) Penamatan awal kontrak berkenaan sebelum kem yang baru beroperasi telah menyebabkan kerugian kepada plaintif. Oleh itu, klausa 36 yang bukan sahaja menyekat plaintif daripada kerugian tersebut, malah menghalang plaintif dari mencabar atau meminta penjelasan terperinci mengenai penamatan tersebut adalah merupakan satu bentuk penindasan yang jelas melanggar prinsip 'public policy'.

**[15]** Both parties are dissatisfied with various aspects of the judgment and have thus lodged their respective appeals to the Court of Appeal on 26 June 2023 and 13 July 2023.

## FINDINGS OF THIS COURT

**[16]** Before us, both parties basically re-hashed their submissions made before the High Court particularly the legal position with respect to cl 36 of the contract vis a vis the Federal Constitution and ss 24 and 29 of the Contracts Act 1950 as interpreted in the case of *CIMB Bank Bhd v Anthony Lawrence Bourke & Anor* [2019] 2 MLJ 1; [2019] 2 CLJ 1 (FC) ('*CIMB* case').

**[17]** However, it is plain that our function here is merely that of review based on the record of appeal. In *Perembun (M) Sdn Bhd v Conlay Construction Sdn Bhd* [2012] 4 MLJ 149; [2012] CLJU 1416 (CA), Abdul Wahab Patail JCA held as follows with emphasis added by us:

A [4] Both parties began their submissions with the clear understanding that an appellate court will be slow to interfere with the findings of facts and judicial appreciation of the facts in the trial judge. They cited this court in *Sivalingam a/l Periasamy v Periasamy & Anor* [1995] 3 MLJ 395; [1996] 4 CLJ 545 CA (CA). This general principle was adopted by this court in *Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor* [2003] 2 MLJ 97; [2003] 2 CLJ 19 and other cases. It is clear it is a general principle and that there are exceptions when appellate intervention is necessary to ensure justice is done. In the cases regularly cited, the terms 'intervene' and 'interfere' are used interchangeably. A more precise use of terminology would remove much unnecessary confusion and argument. It is more precise to say that an appellate court will intervene to correct an injustice when it is shown to have occurred in the trial court, but it would be an interference otherwise.

...

[7] There is almost no limit to the range within which cases in court may vary. At one end there are cases that involve solely questions of law, and no facts are disputed. On the other there are cases that involve no law but all the facts are disputed. Within these cases there may be cases with disputed facts that involve solely interpretation and inferences leading to a conclusion on a finding on the disputed fact, and there may be other cases with disputed facts that involve solely oral evidence and the finding depends entirely upon an assessment of the credibility of witnesses who testified and were tested before the trial judge.

[8] *Hence, the proper approach is that if: (a) it is shown that the judgment cannot be explained or justified by the special advantage enjoyed by the trial judge by reason of having seen and heard the witnesses testify and being tested before him; and (b) an injustice is demonstrated to have been occasioned by any error by the trial judge*, for example:

(a) *the judgment is based upon a wrong premise of fact or of law*;

(b) there was insufficient judicial appreciation by the trial judge of the evidence of circumstances placed before him;

(c) the trial judge has completely overlooked the inherent probabilities of the case;

(d) that the course or events affirmed by the trial judge could not have occurred;

(e) *the trial judge had made an unwarranted deduction based on faulty judicial reasoning from admitted or established facts*; or

(f) *the trial judge had so fundamentally misdirected himself that one may safely say that no reasonable court which had properly directed itself and asked the correct questions would have arrived at the same conclusion*;

*an appellate court will intervene to rectify that error so that injustice is not occasioned.*

**[18]** Moreover, in *Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors* [2020] 12 MLJ 67; [2020] 10 CLJ 1 (FC), Zaleha Yusof FCJ held as follows with emphasis also added by us:

[71] From the aforesaid authorities, there appears to be a difference in approach taken and applied by the UK Supreme Court and the approach taken by the Malaysian courts. Whilst Lord Reed in *Henderson* separated the four non-exhaustive identifiable errors of a trial judge from the plainly wrong test:

(a) a material error of law;

(b) a critical finding of fact which has no basis in the evidence;

(c) emonstrable misunderstanding of relevant evidence; and

(d) a demonstrable failure to consider relevant evidence;

(all of which justifies appellate intervention of a trial judge's decision), this court in *Gan Yook Chin* effectively included them under what amount to the trial judge as being 'plainly wrong'.

[72] The phrase 'lack of judicial appreciation of evidence' used in *Gan Yook Chin* could very well encompass three out of four errors of a trial judge (other than the 'material error of law') said to be identifiable by Lord Reed in *Henderson*, namely:

(a) critical factual finding which has no basis in evidence;

(b) demonstrable misunderstanding of relevant evidence; and

(c) demonstrable failure to consider relevant evidence.

[73] *Given that the issue at present is about identifying situations where the findings of fact by a trial court justify appellate intervention, the other identifiable error of 'material error of law' listed by Lord Reed in Henderson can occur when a trial judge erroneously apply legal principles (eg rules of evidence) in the course of making a finding of fact, thus resulting in a lack of judicial appreciation of evidence. For example, when a trial judge erroneously placed a burden of proof on a party, that will lead the judge to misdirect himself when he attempts to interpret the factual matrix before him. The commission of material error of law by the trial judge in arriving at his conclusions (eg, the requirement of proof of intention in constructive trust as opposed to express trust), also justifies an appellate court reversing such conclusions*.

[74] Thus, whilst there is a slight difference in approach of appellate intervention, both the UK Supreme Court and our Federal Court effectively shares a common thread where it has been held that appellate intervention is justified where there is lack of judicial appreciation of evidence.

[75] The Court of Appeal in Singapore applies the plainly wrong test which is similar to our Federal Court, as illustrated in *Damu Jadhao v Paras Nath Singh* [1965] 2 MLJ 151; [1965] CLJU 30; [1965] 1 LNS 30, when it held:

> The principles under which an appellate court acts when an appellant seeks to displace the conclusion arrived at by a trial judge on questions of fact have been very recently restated by the Privy Council in the case of *Tay Kheng Hong v Heap Moh Steamship Co Ltd* [1964] 1 MLJ 87; [1964] CLJU 202; [1964] 1 LNS 202 at 153 need only refer to a passage of the judgment of Lord Guest when dealing with the matter, where he states:
>
> Before the Court of Appeal in Singapore was entitled to reject the trial judge's

estimate of the credibility of the appellant and Goh Leh they would have to be satisfied that the trial judge's view was plainly wrong and that any advantage which he enjoyed by having seen and heard the witnesses was not sufficient to explain his conclusion.

This case seems to me to be completely dependent on the trial judge's estimate of the credibility of the appellant and his witnesses and nothing that counsel for the appellant has put forward in his arguments before me has persuaded me that the trial judge's view of the credibility of the witnesses before him was in any way plainly wrong.

[76] *What is pertinent is that, the 'plainly wrong' test is not intended to be used by an appellate court as a mean to substitute its own decision for that of the trial court on the facts*.

[77] *It is to be observed that this court in Tengku Dato' Ibrahim Petra Tengku Indra Petra had referred to McGraddie and Henderson and has adopted the Henderson approach of the 'plainly wrong' test in determining whether the trial court's findings of fact is reversible upon appeal*:

Recently in *Henderson v Foxworth Investments Ltd and Another* [2014] 1 WLR 2600, the United Kingdom Supreme Court held that in the absence of some other identifiable error, such as a material error of law or the making of a critical factual finding which had not interfered with the factual finding which had no basis in the evidence, an appellate court should not interfere with the factual findings of a trial judge unless it was satisfied that the decision of the trial judge was 'plainly wrong' in the sense that it could not reasonably be explained or justified and so was one which no reasonable judge could have reached, and that if the appellate court was not satisfied that the decision came within that category it was irrelevant that, with whatever degree of certainty, it considered that it would have reached a different conclusion from the trial judge.

[78] *Hence following this court's ruling in Tengku Dato' Ibrahim Petra Tengku Indra Petra an appellate court should not interfere with the factual findings of a trial judge unless it was satisfied that the decision of the trial judge was 'plainly wrong' where in arriving at the decision it could not reasonably be explained or justified and so was one which no reasonable judge could have reached. If the decision did not fall within any of the aforesaid category, it is irrelevant, even if the appellate court thinks that with whatever degree of certainty, it considered that it would have reached a different conclusion from the trial judge*.

[79] The outcome of the present appeal would therefore turn upon whether the findings of the learned trial judge were reasonably made.

...

[148] Given the aforesaid, *we form the view that rather than adopting a rigid set of rules to demarcate the boundaries of appellate intervention insofar as findings of fact are concerned, the 'plainly wrong' test as espoused in decisions of this court should be retained as a flexible guide for appellate courts. As long as the trial judge's conclusion can be supported on a rational basis in view of the material evidence, the fact that the appellate court feels like it might have decided differently is irrelevant. In other words, a finding of*

*fact that would not be repugnant to common sense ought not to be disturbed. The trial judge should be accorded a margin of appreciation when his treatment of the evidence is examined by the appellate courts.*

**[19]** It does not seem to be in dispute factually between the parties that the defendant post the general elections of 2018 resolved to dissolve the National Service Training Programme otherwise known as the *Program Latihan Khidmat Negara* (PLKN) upon the direction of the Minister of Finance in the national interest. Consequently, the defendant issued the notice of termination of the contract on 3 September 2018.

**[20]** Consequently, the crux of these appeals is whether cl 36 of the contract as exercised by the defendant violated art 8 of the Federal Constitution and/or the Contracts Act 1950; hence void and non-binding.

**[21]** It is therefore appropriate to reproduce these provisions of the constitution and statute relied on by the plaintiff:

Article 8 Equality

(1) All persons are equal before the law and entitled to the equal protection of the law.

(2) Except as expressly authorized by this Constitution, there shall be no discrimination against citizens on the ground only of religion, race, descent, place of birth or gender in any law or in the appointment to any office or employment under a public authority or in the administration of any law relating to the acquisition, holding or disposition of property or the establishing or carrying on of any trade, business, profession, vocation or employment.

(3) There shall be no discrimination in favour of any person on the ground that he is a subject of the Ruler of any State.

(4) No public authority shall discriminate against any person on the ground that he is resident or carrying on business in any part of the Federation outside the jurisdiction of the authority.

(5) This Article does not invalidate or prohibit —

(a) any provision regulating personal law;

(b) any provision or practice restricting office or employment connected with the affairs of any religion, or of an institution managed by a group professing any religion, to persons professing that religion;

(c) any provision for the protection, well-being or advancement of the aboriginal peoples of the Malay Peninsula (including the reservation of land) or the reservation to aborigines of a reasonable proportion of suitable positions in the public service;

(d) any provision prescribing residence in a State or part of a State as a qualification for election or appointment to any authority having jurisdiction only in that State or part, or for voting in such an election;

(e) any provision of a Constitution of a State, being or corresponding to a provision in force immediately before Merdeka Day;

(f) any provision restricting enlistment in the Malay Regiment to Malays.

Section 24 What considerations and objects are lawful, and what not

The consideration or object of an agreement is lawful, unless —

(a) it is forbidden by a law;

(b) it is of such a nature that, if permitted, it would defeat any law;

(c) it is fraudulent;

(d) it involves or implies injury to the person or property of another; or

(e) the court regards it as immoral, or opposed to public policy.

In each of the above cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.

Section 29 Agreement in restraint of legal proceedings void

Every agreement, by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void to that extent.

Saving of contract to refer to arbitration dispute that may arise

Exception 1 — This section shall not render illegal a contract by which two or more persons agree that any dispute which may arise between them in respect of any subject or class of subjects shall be referred to arbitration, and that only the amount awarded in the arbitration shall be recoverable in respect of the dispute so referred.

Saving of contract to refer questions that have already arisen

Exception 2 — Nor shall this section render illegal any contract in writing, by which two or more persons agree to refer to arbitration any question between them which has already arisen, or affect any law as to references to arbitration.

Exception 3 — Nor shall this section render illegal any contract in writing between the Government and any person with respect to an award of a scholarship by the Government wherein it is provided that the discretion exercised by the Government under that contract shall be final and conclusive and shall not be questioned by any court.

In this exception, the expression 'scholarship' includes any bursary to be awarded or tuition or examination fees to be defrayed by the Government and the expression 'Government' includes the Government of a State.

**[22]** At this juncture, it is germane to refer to the *CIMB* case which was strenuously relied both by the plaintiff and the learned JC where Balia Yusof Wahi FCJ held as follows with emphasis added by us:

> [19] The issue before us is rather straightforward in that it calls for determination whether cl 12 of the loan agreement offends s 29 of the Contracts Act 1950. Clause 12 reads as follows:
>
> Liability
>
> > Notwithstanding anything to the contrary, in no event will the measure of damages payable by the Bank to the Borrower for any loss or damage incurred by the Borrower include, nor will the Bank be liable for, any amounts for loss of income or profit or savings, or any indirect, incidental consequential exemplary punitive or special damages of the Borrower, even if the Bank had been advised of the possibility of such loss or damages in advance, and all such loss and damages are expressly disclaimed.
>
> ...
>
> [25] *An exclusion clause has been defined as any clause in a contract or term in a notice which purports to restrict, exclude or modify a liability, duty or remedy which would otherwise arise from a legally recognised relationship between parties. The traditional conception of such a clause envisages it as a defensive shield raised by a party to a claim brought either in contract or tort, usually for breach of some implied term of the contract, for breach of a duty of care at common law or for misrepresentation* (see: *The Construction of Contracts, Interpretation, Implication and Rectification* (2nd Ed) Gerard Mc Meel).
>
> [26] We agree with the defendant that parties are bound by the terms of the contract which they entered into and that it is the court's duty to give effect to the clear and plain meaning of the words in the said clause. That is quite trite.
>
> [27] The law recognises the principle of freedom of contract. Parties to a contract are free to determine for themselves what their obligations are. As Sir George Jassel MR said in *Printing and Numerical Registering Co v Sampson* (1875) LR 19 Eq 462 at 465:
>
> > ... men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice. Therefore you have this paramount public policy to consider — that you are not lightly to interfere with this freedom of contract.
>
> [28] It is also trite that an agreement must be construed by the words used in the agreement and the court is not empowered to improve upon the instrument which it is called upon to construct. This we have stated in *Berjaya Times Square Sdn Bhd v M Concept Sdn Bhd* [2010] 1 MLJ 597; [2010] 1 CLJ 269 where it was reiterated:
>
> > The court has no power to improve upon the instrument which it is called upon to construct, whether it be a contract, a statute or article of association. It cannot introduce terms to make it fairer or more reasonable. However, that meaning is not necessarily or always what the authors or parties to the document would have

A intended. It is the meaning to a reasonable person having all the background knowledge which would reasonable be available to the audience to whom the instrument is addressed; see *Investors Compensation Scheme Ltd v West Bromwich Building Society*. It is this objective meaning which is conventionally called the intention of the parties, or the intention of Parliament or the intention of whatever person or body was or is deemed to have been the author of the instrument.

B

...

[31] *In dealing with the issue of interpreting and applying exclusion clauses, we take it as settled law and agree with the submissions of the defendant that post Photo Production Ltd v Securicor Transports Ltd* [1980] AC 827 *whether an exclusion clause applies is a matter of construction as was decided by this court in CIMB Bank Bhd v Maybank Trustees Bhd and other appeals* [2014] 3 MLJ 169; [2014] 3 CLJ 1. As such, we do not deem it necessary to dwell any further on the issue of the applicability of the concept of fundamental breach or a breach of the fundamental term of the agreement.

C

D

[32] We are dealing here with cl 12 of the loan agreement. In our view, given its natural and ordinary meaning, the said clause is susceptible to one meaning only and that meaning must be given effect to and enforced however unreasonable the court may think it is. The words in the clause are clear and one does not even need to resort to the contra proferentum rule of construction.

E

...

[39] Section 29 of the Contracts Act 1950 reads:

29 Agreements in restraint of legal proceedings void

F

Every agreement, by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights is void to that extent.

G

[40] *The pertinent question to ask is whether the plaintiffs were absolutely restricted from enforcing their rights under or in respect of the contract. Once again, we have to examine cl 12 of the loan agreement. From our reading of the said clause (which we have reproduced at para 19 earlier) the plaintiffs are precluded from claiming any loss or damage and the defendant will not be liable for any amount for loss of income or profit or savings, or any indirect, incidental, consequential, exemplary, punitive or special damages*.

H

[41] *Such are the kind or form of damages and losses that the defendant seeks to disclaim under the said clause*.

...

I

[43] *We agree with the views of the Court of Appeal that the kind of damages spelt out in the said cl 12 encompasses all forms of damages under suit for a breach of contract or negligence*. One may ask: if the plaintiffs were precluded from claiming the remedies they sought under para 21 of their statement of claim, what can they claim against the defendant? Are they not totally restricted from enforcing their rights in respect

of the contract? *In our considered view, on the plain meaning of the words used in the said cl 12 of the loan agreement, whatever the plaintiffs are claiming has been negated and as such s 29 of the Contracts Act 1950 ought to be invoked*.

...

[60] *Moving on to a different ground, learned counsel for the plaintiffs also submitted on the issue of public policy and referred to a passage in New Zealand Insurance wherein it was stated:*

> *... The primary duty of a court of law is to enforce a promise which the parties have made and to uphold the sanctity of contracts into which the parties have an unfettered right to enter provided they are not opposed to public policy or are not hit by any provision of the law of the land ...* (Emphasis added.)

[61] *Pollock and Mulla on Indian Contract Act and Specific Relief Act (10th Ed) describes 'public policy' in the following terms*:

> *Public Policy — The Principle of public policy is this: ex dolo molo non oritur actio. Lord Brougham defines public policy as the principle which declares that no man can lawfully do that which has a tendency to be injurious to the public welfare*.
>
> (See also: *Holman v Johnson* (1775) 98 ER 1120)

[62] Section 24(c) of the Contracts Act 1950 explains that the consideration or object of an agreement is not lawful if it is opposed to public policy.

...

[65] *Clause 12 may typically be found in most banking agreements. In reality, the bargaining powers of the parties to that agreement are different and never equal. The parties seldom deal on equal terms. In today's commercial world, the reality is that if a customer wishes to buy a product or obtain services, he has to accept the terms and condition of a standard contract prepared by the other party. the plaintiffs, as borrowers in the instant case, are no different. They have unequal bargaining powers with the defendant*. As succinctly put by Lord Reid in the House of Lords in *Suisse Atlantique Societe D'armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1966] 2 All ER 61.

> *Exemption clauses differ greatly in many respects. Probably the most objectionable are found in the complex conditions which are not so common. In the ordinary way the customer has no time to read them, and if he did read them he would probably not understand them. And if he did understand and object to any of them, he would generally be told he could take it or leave it. And if he then went to another supplier the result would be the same. Freedom of contract must surely imply some choice or room for bargaining*.

[66] *In our considered view, this is one instance which merits the application of this principle of public policy. There is the patent unfairness and injustice to the plaintiffs had this cl 12 been allowed to deny their claim/rights against the defendant. It is unconscionable on the part of the bank to seek refuge behind the clause and an abuse of the freedom of contract*. As stated by Denning LJ in *John Lee & Sons (Grantham) Ltd and Others v Railway Executive* [1949] 2 All ER 581*:*

> Above all, there is the vigilance of the common law while allowing for freedom of contract, watches to see that it is not abused.
>
> [67] *The House of Lords had also observed in Suisse Atlantique Societe that freedom of contract must surely imply some choice or room for bargaining. The plaintiffs in this appeal had none. This court too, must be vigilant and will not shrink from properly applying the principle in deserving cases. Public policy is not static*.
>
> [68] *The right of access to the courts has always been jealously guarded by the common law, and the general principle remains that contracts which seek to oust the jurisdiction of the courts are invalid* (see: RA Buckley, *Illegality and Public Policy* (Sweet & Maxwell (3rd Ed) 2013 at para 8.02)
>
> ...
>
> [70] *We pause here to state our view on the proposition that courts must be careful not to apply this principle where there are limitations placed on the rights and remedies of the contracting parties. In our view, limitations placed or spelt out in an exclusion clause does not offend s 29 of our Contracts Act 1950 which speaks of absolute restriction. Mere limitations and/or some restrictions added into an exclusion clause is insufficient to invoke s 29. There is a stark difference between the restriction placed under cl 3.5.8 of the agreement in the Singapore case above-quoted and cl 12 of the loan agreement in our instant appeal. It is to be noted that the Singapore court found in that case that: 'Clause 3.5.8 does not attempt to restrict or limit an innocent party's right to damages at common law, it does attempt to limit or restrict a contracting party's right to an injunction in equity ... Such a clause is more in the nature of an exclusion or exception clause (as opposed to a clause seeking to oust the jurisdiction of the court)*'.
>
> [71] *Clause 12 of the loan agreement in the instant appeal on the other hand speaks of an absolute restriction to the plaintiffs' right to damages. The difference is appreciable and thus the case is clearly distinguishable from the instant appeal*.

**[23]** For purposes of these appeals, we will deal with the arguments advanced by the plaintiff systematically *seriatim*.

**[24]** First and foremost, we have carefully read cl 36 of the contract vis a vis art 8 of the Federal Constitution. This is a non-starter in our view in that we do not see any discrimination made specifically against the plaintiff by the defendant that violated the safeguard or protection accorded by art 8.

**[25]** Next in respect of the standing of cl 36 of the contract vis a vis s 29 of the Contracts Act 1950, the plaintiff implored us to follow the reasoning in the *CIMB* case which was wholly relied by the learned JC as seen in paras [39] and [40] as well as [50] of the GOJ.

**[26]** We observed that the *CIMB* case has caused unease, as it seems to have altered the commonly understood norm and application of exclusion or limitation of liability provision in commercial contracts: see, amongst others,

the following academic treatises: *An Exclusion Clause Wrongly Ousted: A Well Drafted Exclusion Clause Misinterpreted On Many Levels, University of Malaya Law Review* (2019) and *The Legal Saga of Exclusion Clauses in Malaysia, Review of Politics and Public Policy in Emerging Politics Journal UTAR* (Vol 1 No 1 June 2019). This unease arises primarily because it was held in *The Pacific Bank Bhd (sued as guarantor) v Kerajaan Negeri Sarawak* [2014] 6 MLJ 153; [2015] 3 CLJ 717 (FC) that s 29 of the Contracts Act 1950 would only be attracted if there is contractual restriction on the enforcement of a right, particularly regarding the timing of the commencement of an action in court.

**[27]** Notwithstanding this, as with all judicial endeavours, the applicability or otherwise of a judicial precedent, including that of the apex court, is highly dependent on the facts and circumstances of each case.

**[28]** In this respect, we noticed two obvious dissimilarity between the facts here and those in the *CIMB* case.

**[29]** Firstly, the contract here involves the Federal Government and a private entity, whereas the *CIMB* case involved two private entitles.

**[30]** Secondly, it must foremost be appreciated that cl 36 of the contract is a termination for convenience provision in the national interest and not a termination for default provision. The exclusion cl 36.3 here is triggered upon termination of the contract by the Federal Government without default, whereas the exclusion clause in the *CIMB* case was triggered due to the claim by the customer for default or breach on the part of the bank.

**[31]** Consequently, we are not strictly bound by the *CIMB* case due to the principle of stare decisis.

**[32]** Be that as it may, we observed that the Federal Court therein whilst dealing with cl 12 of the loan agreement construed that the clause absolutely restricted the plaintiff from enforcing his rights and remedies under the banking loan contract, which tantamounted to a clause that sought to oust the jurisdiction of the court; thereby violated s 29 of the Contracts Act 1950.

**[33]** Upon our construction of cl 36.3 of the contract here, we do not find that all the plaintiff's rights and remedies have been absolutely restricted by the defendant's invocation of cl 36.1 of the contract. In this regard, the plaintiff is only disallowed from claiming loss and damage consequential to the termination of the contract, but not the contract consideration which has already accrued to the plaintiff up to the termination of the contract. As the result, we do not find that cl 36.3 of the contract infringes s 29 of the Contracts Act 1950.

**[34]** Furthermore, we observed that the learned JC by following the *CIMB* case again, found it justified to strike down cl 36 of the contract because of unequal bargaining power between the parties here.

**[35]** The contract in the *CIMB* case is a banking loan contract. It must be appreciated that, in such instances, it is the customer who bargains with the bank during the procurement of the loan, but the bank prevailed on its terms of the contract because of its stronger bargaining position. The position is quite different here. This is a services contract procured by the plaintiff on an open tender basis at the invitation of the defendant. The terms of the contract required by the defendant were made known to all tenderers prior to submission of tender. The plaintiff was at liberty not to bid if the requisite terms are unacceptable to the plaintiff. There is also no evidence that the plaintiff has sought to delete cl 36 of the contract at all material times. Factually, there was hence no bargaining here that attracted the notion of unequal bargaining power.

**[36]** We are therefore of the view that the learned JC's reasoning in paras [61] to [63] of the GOJ is conjecture and accordingly unsustainable.

**[37]** Consequently, we find that the learned JC made a serious misdirection and is plainly wrong by applying s 29 of the Contracts Act 1950 to invalidate cl 36 of the contract. Appellate intervention is thus justified.

**[38]** That notwithstanding and for completeness, we find that the contract does not offend s 24 of the Contracts Act 1950, contrary to what was alluded by the plaintiff because we do not find the objects therein to be unlawful in any way. Moreover, we find and hold that the termination for convenience in the national interest without default provision in cl 36 of the contract is also not contrary to public policy. This is by reason that the plaintiff still has legal recourse if that termination provision has been used capriciously in bad faith; see *Pembinaan Perwira Harta Sdn Bhd v Letrikon Jaya Bina Sdn Bhd* [2013] 2 MLJ 620; [2013] 2 CLJ 437 (FC). Before us, we are satisfied from the evidence adduced that cl 36 of the contract has been invoked in the national interest, particularly due to the financial constraint faced by the defendant. The plaintiff however, has not made out a case that the usage of cl 36 of the contract by the defendant was improper and mala fide.

**[39]** We are also supported by the decision of this court in the related case of *Kerajaan Malaysia v Bagai Budi Sdn Bhd* (Civil Appeal No W-01(NCVC)(W)-413–06 of 2022) (unreported) premised on similar facts. The broad grounds of decision therein read as follows:

> Kami mendapati hakim Mahkamah Tinggi telah terkhilaf dalam dapatan

undang-undang bahawa klausa 36 dalam perjanjian adalah bercanggah dengan Perlembagaan Persekutuan dan Akta Kontrak 1950. Justeru pendapatan beliau bahawa ia tidak mengikat responden. A

Kami juga berpendapat bahawa hakim Mahkamah Tinggi telah terkhilaf apabila memutuskan ketidaksama rataan kuasa tawar-menawar, ia itu 'unequal bargaining power' antara perayu dan responden adalah satu pelanggaran hak kesama rataan dibawah Perlembagaan Persekutuan dan juga telah melanggar prinsip undang-undang kontrak. B

Kami dapati klausa 36 bukannya ultra vires ataupun bercanggah s 29 Akta Kontrak 1950. Perayu, iaitu Kerajaan Malaysia berhak untuk menanmatkan perjanjian dengan berikan notis 30 hari atas alasan kepentingan negara. C

Dalam kes ini setelah kerajaan berubah selepas pilihan raya 2018, kerajaan baru bertukar dasar dengan memasukkan program PLNK.

Maka kami setuju dengan hujahan perayu bahawa atas perubahan dasar kerajaan ini. Perayu menggunakan klausa 36 untuk menamatkan perjanjian tersebut. D

Maka adalah jelas bahawa hakim Mahkamah Tinggi telah terkhilaf dalam dapatan beliau bahawa perjanjian dengan Perayu telah menyalahi undang-undang.

Mengenai isu kuantum, kami setuju denagan hujahan perayu bahawa jumlah ganti rugi yang diberikan oleh Mahkamah Tinggi adalah tidak mengikut prinsip undang-undang. Hakim Mahkamah Tinggi telah terkhilaf membenarkan jumlah RM9,232,800 sebagai ganti rugi atas kos naik taraf dan jumlah RM11,042,523.22 sebagai kerugian kehilangan keuntungan untuk tempoh baki kontrak dari Oktober 2018 sehingga Disember 2020. Mengikut undang-undang ganti rugi untuk pelanggaran kontrak hanya satu daripada jenis kerugian ini boleh dibuatkan. E F

Lanjutnya kami berpendapat bahawa responden memang tidak layak menuntut ganti rugi ke atas kos naik taraf menurut peruntukkan kontrak.

Berkenaan kerugian kehilangan keuntungan untuk tempoh baki kontrak dari Oktober 2018 sehingga Disember 2020. Kami bersetuju dengan hujahan perayu bahawa sekiranya responden berjaya membuktikan liabiliti maka mereka hanya boleh menuntut ganti rugi sebanyak RM1,489,353.60 sepertimana perkiraan dalam perenggan 50 ringkasan hujahan perayu. G

Memandangkan responden gagal buktikan *liability*, maka jumlah ini mereka tidak berhak menuntut. H

Maka kami dapati bahawa award ganti rugi yang dibenarkan oleh Mahkamah Tinggi adalah tidak mematuhi prinsip undang-undang dan daripada itu, hakim Mahkamah Tinggi telah terkhilaf.

Maka secara keseluruhan, kami dapati rayuan ini mempunyai merit. Justeru, rayuan dibenarkan, dan perintah Mahkamah Tinggi diketepikan secara keseluruhan. Kos kepada perayu sebanyak RM30,000 di sini dan di bawah. I

**[40]** In summary, we find and hold that cl 36.1 of the contract has been

lawfully exercised and the plaintiff's consequential claims are losses which are excluded by cl 36.3 of the contract.

CONCLUSION

**[41]** By reason of the foregoing, we unanimously allow Appeal 324 and the decision of the High Court is set aside.

**[42]** As the result of us allowing Appeal 324, it follows that Appeal 388 which is on the head of claim for loss of rental of infrastructure services and provision of catering services for the period from October to December 2020 that was disallowed by the learned JC is unsustainable. This is because the claim is a loss that is excluded by cl 36.3 of the contract upon its true construction. Accordingly, we dismiss Appeal 388 too.

**[43]** Finally, we award global costs of RM 20,000 to the defendant here and below for both appeals subject to allocator.

*GOM's appeal allowed; and PDS's appeal dismissed.*

Reported by Ashok Kumar